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In the Supreme Court of the United States

OCTOBER TERM, 1975

THOMAS U. GREER, COMMANDER, FORT DIX MILITARY RESERVATION, ET AL., PETITIONERS

v.

BENJAMIN SPOCK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the district court on respondents' motion for a preliminary injunction (Pet. App. 1a–8a) is reported at 349 F. Supp. 179. The opinion of the court of appeals on appeal from the denial of a preliminary injunction (Pet. App. 9a–32a) is reported at 469 F. 2d 1047. The district court's final opinion (Pet. App. 39a–43a) is unreported. The final opinion of the court of appeals (Pet. App. 47a–55a) is reported at 502 F. 2d 953.

[1] Major General Thomas U. Greer has succeeded Major General Bert A. David as the Commander of Fort Dix.

JURISDICTION

The judgment of the court of appeals (Pet. App. 56a) was entered on August 14, 1974. By orders entered November 1, 1974, and December 3, 1974, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to January 11, 1975. The petition was filed on January 10, 1975, and granted on April 14, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the First Amendment requires the commanding officer of the Fort Dix Military Reservation to allow political campaigning on the base.

2. Whether the First Amendment forbids the commanding officer of the Fort Dix Military Reservation from requiring permission for the distribution of leaflets on the base, which permission would be denied only in regard to publications that clearly threaten military discipline or morale.

STATUTE AND REGULATIONS INVOLVED

18 U.S.C. 1382 provides:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
>
> Shall be fined not more than $500 or imprisoned not more than six months, or both.

Department of Defense Directive 1325.6 provides:

* * * * *

III *Specific Guidelines*

The following guidelines relate to principal activities in this area which the Armed Forces have encountered:

A. *Possession and Distribution of Printed Materials*

1. A Commander is not authorized to prohibit the distribution of a specific issue of a publication distributed through official outlets such as post exchanges and military libraries. In the case of distribution of publications through other than official outlets, a Commander may require that prior approval be obtained for any distribution on a military installation in order that he may determine whether there is a clear danger to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission. When he makes such a determination, the distribution will be prohibited.

* * * * *

3. The fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited.

* * * * *

Army Regulation 210–10, par. 5–5 provides in part:

* * * * *

c. Restrictions on disseminations of publications. If it appears that the dissemination of a publication presents a clear danger to the

loyalty, discipline, or morale of troops at his installation, the installation commander may, without prior approval of higher headquarters, delay the distribution of any publication which he considers undesirable, on property subject to his control. The commander will consider whether the act of restriction will in itself result in the publication in question achieving notoriety and increased circulation to military personnel through off-post sources.

d. Reports. Concurrently with imposing a delay as authorized in *c* above, the installation commander will so inform the next major commander and Headquarters, Department of the Army (Chief of Public Information, extension 74200), and request from Headquarters, Department of the Army, approval to prohibit the distribution of that publication or the particular issue thereof. Telephonic communication will be used in each instance. If the publication in question is one which is unlikely to be available at Headquarters, Department of the Army, a copy of the publication or a transcript of the text of the portion giving rise to the dissemination restriction will be forwarded to Headquarters, Department of the Army, by the fastest available means. The delay in distribution will remain in force until the decision to approve or disapprove the request is made. These reports are exempt under provisions of paragraph 7–2*a*, AR 335–15.

e. Distribution outlets. An installation commander may, in his discretion, impose a requirement that distribution of publications may not be made except through regularly established and approved distribution outlets, unless

prior approval is obtained from the commander or his authorized representative. The installation commander may, without informing higher headquarters or Department of the Army in advance, take appropriate action to prevent the distribution of publications by persons who have not obtained the required approval. Except where the publication in question is published primarily for advertising or promotional purposes, a denial of a request for permission to distribute a publication will be reported as required in *d* above.

Army Regulation 360–61 provides in pertinent part:

2–1. *General.* The policy of the Department of the Army is to support public events in the civilian domain subject to operational and training requirements, budget limitations, and guidelines enumerated in paragraph 2–3.

2–2. *Restrictions. a.* Army participation (and cooperation) is not authorized when such participation may directly or indirectly (indorse or selectively) benefit (or favor), or appear to (indorse or selectively) benefit (or favor) a private individual, group, corporation (whether for profit or nonprofit), sect, fraternal organization, quasi-religious or ideological movement, political group, or commercial venture, or be associated with solicitation of votes in a political election.

(1) For the purposes of this regulation—

(*a*) Providing use of Government facilities, such as transportation, housing, or messing, at Government expense is considered a form of Army participation.

* * * * *

Fort Dix Regulation 210–26, par. 2a provides:

> Demonstrations, picketing, sit-ins, protest marches, political speeches and similar activities are prohibited and will not be conducted on the Fort Dix Military Reservation.

Fort Dix Regulation 210–27 provides in part:

* * * * *

> 2. *Proper Practices:* The distribution or posting of handbills, circulars, pamphlets or other writings or publications issued by commanders and staff agencies relating to the performance of their respective missions is authorized.
>
> 3. *Prohibited Practices:*
>
> *a.* The distribution or posting of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued, published or otherwise prepared by any person, persons, agency or agencies other than those set forth in paragraph 2, above, and paragraph 5, below, is prohibited on the Fort Dix Military Reservation without prior written approval of the Adjutant General, this headquarters.

* * * * *

Department of Army Guidance on Dissent provides:

* * * * *

> 5. The following general guidelines are provided to cover some of the manifestations of dissent which the Army has encountered.
>
> a. *Possession and distribution of political materials.*
>
> (1) In the case of publications distributed through official outlets such as Post Exchanges

> and Post Libraries, a commander is authorized to delay distribution of a specific issue of a publication in accordance with the provisions of para. 5–5 of AR 210–10. Concurrently with the delay, a commander must submit a report to the Department of the Army * * *. A commander may delay distribution only if he determines that the specific publication presents a clear danger to the loyalty, discipline, or morale of his troops.
>
> (2) In the case of distribution of publications through other than official outlets, a commander may require that prior approval be obtained for any distribution on post. Distribution without prior approval may be prohibited. A commander's denial of authority to distribute a publication on post is subject to the procedures of para. 5–5, AR 210–10, discussed above.
>
> (3) A commander may not prevent distribution of a publication simply because he does not like its contents. All denials of permission for distribution must be in accordance with the provisions of para. 5–5, AR 210–10. For example, a commander may prohibit distribution of publications which are obscene or otherwise unlawful (e.g., counselling disloyalty, mutiny, or refusal of duty). A commander may also prohibit distribution if the manner of accomplishing the distribution materially interferes with the accomplishment of a military mission (e.g., interference with training or troop formation). In any event, a commander must have cogent reasons, with supporting evidence, for any denial of distribution privi-

leges. The fact that a publication is critical—even unfairly critical—of government policies or officials is not in itself, a grounds for denial.

* * * * *

STATEMENT

1. On September 29, 1972, respondents brought this action against the Secretary of Defense and the Commander of the Fort Dix Military Reservation to enjoin the Army from enforcing its regulations governing political campaigning and the distribution of literature within Fort Dix, New Jersey, and to obtain a declaratory judgment that the regulations violated the First and Fifth Amendments (I-App. 4–10). Plaintiffs included the Socialist Workers Party and four individuals [2] who were candidates of the People's Party and the Socialist Workers Party for the offices of President and Vice President of the United States in the 1972 election (Pet. App. 10a). Of the four remaining plaintiffs, two [3] were members of the Central Committee for Conscientious Objectors [4] and the other two [5] belonged to organizations that opposed

[2] Respondents Benjamin Spock and Julius Hobson were respectively candidates of the People's Party for President and Vice President (Pet. App. 10a); plaintiffs Linda Jenness and Andrew Pulley (who were dismissed as parties, see p. 18, *infra*) were, respectively, candidates of the Socialist Workers Party for President and Vice President (*ibid.*).

[3] John Ginaven and Donald Misch (I-App. 5).

[4] In their complaint, respondents described the Committee as a non-profit organization that "publishes and distributes material on military and draft law, trains military and draft counselors, and seeks to spread knowledge of the rights of servicemen and—women" (I-App. 5).

[5] Alan Hardy and Robert Stanton (I-App. 5).

American involvement in the war in Indochina. Each of these four plaintiffs had engaged in the unauthorized distribution of literature at Fort Dix at various times in the past (dating back to 1968) and, as a result, had received letters from the Commanding Officer ejecting them from the base and barring their reentry (Pet. App. 2a–3a, 10a).

2. Fort Dix is a United States Army military reservation comprising 55 square miles in a predominantly rural area of central New Jersey, approximately 18 miles southeast of Trenton, New Jersey (Pet. App. 3a; I-App. 24). The vast majority of the geographical area of the Fort is devoted to training activities and, in order to minimize interference with the progress of training, a great deal of this area is off limits to everyone except authorized personnel (I-App. 28). The Fort headquarters, office buildings, troop billets and housing areas are located in a smaller section of the reservation, adjacent to Wrightstown, New Jersey (*id.* at 24). There are seven main entrances to Fort Dix; there are no guard houses at the entrance gates and guards are not normally posted (*ibid.*). Guards have not been utilized because of the inaccessibility of the Fort and the cost of manning the entrances to such a large military installation (Pet. App. 3a; I-App. 24). In 1972 there were some 22,000 military personnel and 6,000 dependents living on the reservation (I-App. 58). Approximately 2,600 civilians worked on the reservation; one civilian employee and his three dependents live there (*id.* at 59).

The primary military mission of Fort Dix is to train recruits in an eight and one-half week course of basic combat training. The average recruit population of the base in 1972 was 15,000. The training schedules provide for a five and one-half day training week for some battalions and a five-day week for others (*id.* at 27). During the first four weeks of training the recruits are restricted to the post (*id.* at 50).

Fort Dix also provides advanced training for several military occupations, such as that of military police officer, chaplain assistant, wheeled vehicle mechanic, wireman, and cook. Also located at Fort Dix are the Army Personnel Center, responsible for the worldwide transportation of military personnel, the Walton Army Hospital, and the Personnel Control Facility. These facilities are operated 24 hours per day, seven days a week (*id.* at 28).

The State of New Jersey retains rights of way over four county roads and the state highway that pass through Fort Dix. These roads are used primarily by military and civilian personnel working on the military installation (*id.* at 25). The sidewalks adjacent to the roads are used primarily by personnel who work at Fort Dix (*ibid.*). No sidewalks traverse the reservation and few civilians attempt to walk through the reservation along the roads (*id.* at 82–83). According to a 1970 traffic survey, approximately 66,000 civilian and military vehicles enter and exit the post each day (*id.* at 72).

Military police patrol the reservation 24 hours a day. Five to eight patrols, each comprised of two mili-

tary police officers, continuously patrol all roadways within the reservation, including those over which the state maintains rights of way (*id.* at 25, 78). Military police routinely stop persons on the reservation and ask them their reason for being on the post (*ibid.*). Military police continually check that vehicles on the post have decals indicating that the vehicle is registered on the post (*id.* at 79). From time to time, military police establish roadblocks on roads within the reservation and stop all vehicles. Such stops are intended to assure that vehicles on the post are properly registered and to keep unauthorized demonstrators off the post (*ibid.*).

The United States retains exclusive jurisdiction over Fort Dix, including the state and county roads passing through it (*id.* at 25, 79). See 52 N.J. Stat. Ann. 30–2 (1955). Traffic regulations promulgated by Fort Dix apply to the state and county roads within the reservation; traffic offenders are issued summonses to the federal magistrate (*id.* at 78–79).[6] Persons who violate Army or post regulations may be ejected from

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[6] See 27 N.J. Stat. Ann. 5A–1 (1966):

"Whenever any public road or highway is located wholly or in part within the limits of a United States military reservation, the United States military authorities shall have the power, within the limits of such reservations, to police such roads and highways, to regulate traffic thereon, and to exercise such supervisory powers over such roads and highways as they may deem necessary to protect life and property on such military reservations."

the post.[7] The United States Attorney's office is notified of any alleged violations of federal statutes (*id.* at 25).

Unfenced areas of the reservation are posted with signs reading "[N]o Trespassing, U.S. Government Property" (*id.* at 78). Signs posted on state and county roads at various entrances to the reservation warn that "[A]ll vehicles are subject to search while on the Fort Dix Military Reservation;" "[S]oliciting prohibited unless approved by the commanding general;" and "[S]treet and roads patrolled by military police" (*id.* at 197–199). Signs posted adjacent to housing areas on the reservation state that "[H]ousing areas off limits to all personnel except bonafide residents, guests and authorized vendors" (*id.* at 199).

Peddlers and solicitors must be authorized to conduct business on the reservation (*id.* at 80), and business concessions must be approved by the Fort Commander (*id.* at 61). Such concessions are primarily for the use of military personnel and their dependents; purchasers must display identification cards unless they are in uniform (*id.* at 61–62).

Civilians who are not dependents of military personnel are, however, permitted to visit nonrestricted areas of the base (*id.* at 66–67). A large sign at the

[7] Between January 1, 1971, and October 5, 1972, 155 persons were barred from reentering Fort Dix. The grounds for such actions include, *inter alia*, disorderly conduct, solicitation for prostitution, possession of narcotics, larceny, carrying a concealed weapon, traffic offenses, and distribution of unauthorized publications (I-App. 74–76).

entrance to Fort Dix on the state road that crosses the base states "Visitors Welcome" (II-App. E–4). Restricted areas, which are marked off by fences, barriers, signs, or guards (I-App. 67), include the ammunition depot, stockade, barracks, and housing areas (*id.* at 73, 199).

Performers and speakers are occasionally invited to the base to entertain or instruct military personnel (*id.* at 62). Businessmen come to speak about business management, religious talks are given at the chapel, civilians give addresses about drug abuse, and musicians occasionally give concerts (*id.* at 53–56). However, prior to the order in the instant case, no campaign speeches were permitted at Fort Dix. And prior to the appearance of Dr. Spock, no candidate for political office had ever campaigned there (*id.* at 63).

3. In September 1972, the four plaintiff candidates wrote to General David, then the Commander of Fort Dix, announcing that they intended to enter the Fort to distribute campaign literature and hold a campaign meeting with military personnel (Pet. App. 2a; I-App. 6). General David replied that the candidates would not be permitted to campaign on Fort Dix, explaining that (I-App. 14–15):

> There are several compelling reasons for this denial which I shall enumerate. First, there are lawful regulations in effect which prohibit political speeches and similar activities on all of the Fort Dix Military Reservation (Fort Dix Regulation 210–26).[8] The distribution of literature without prior approval of this head-

[8] Fort Dix Regulation 210–26 is set out at p. 6, *supra*.

quarters is also prohibited (Fort Dix Regulation 210–27).[9] Also, Department of the Army Regulations prohibit military personnel from participating in any partisan political campaign and further prohibits them from appearing at public demonstrations in uniform. The mission assigned to me as Commanding General of Fort Dix is to administer basic combat training to approximately 15,000 men at any given time. These men spend a period of eight weeks here during which they perform their training on very vigorous schedules occupying virtually all of their time. I am not in a position to dilute the quality of this training by expanding these schedules to include time to attend political campaigning and speeches. Political campaigning on Fort Dix cannot help but interfere with our training and other military missions. To decide otherwise could also give the appearance that you or your campaign is supported by me in my official capacity. I feel that I am prohibited from doing this for any candidate for public office.

Nevertheless, candidates Spock and Pulley approached the base on September 23, 1972. An officer acting on General David's behalf refused to allow the candidates to enter Fort Dix (Pet. App. 2a).

The four other plaintiffs had each been evicted from Fort Dix between 1968 and 1972 after they had been found on the base distributing pamphlets which had not been submitted for prior approval to the

[9] Fort Dix Regulation 210-27 is set out at p. 6, *supra*.

base commander, as required by Fort Dix Regulation 210–27. Plaintiff Stanton was evicted on December 5, 1968, after distributing in a barracks leaflets advertising a planned anti-war teach-in (*id.* at 9). Plaintiff Hardy was evicted on February 24, 1972, after placing on the windshields of cars parked in the lot of the base theater leaflets advertising an anti-war demonstration (*id.* at 8). Plaintiffs Ginaven and Donald Misch were evicted on August 17, 1972, after distributing on the base a booklet describing Army discharges and the rights of soldiers.[10] None of these four plaintiffs had requested permission of the Fort Dix commander prior to distributing literature on the base (*id.* at 81, 89, 91). Each of them was barred from returning to Fort Dix and advised that reentry would violate 18 U.S.C. 1382.

4. After a hearing, the district court denied plaintiffs' motion for a preliminary injunction against enforcement of the Fort Dix regulations governing political campaigning and the distribution of literature on the base (Pet. App. 8a). The court reasoned that the military had not violated plaintiffs' First Amendment rights by prohibiting them from campaigning and distributing pamphlets on public property not designated for general public use, and that

[10] Although according to the complaint (I-App. 8) and respondent Ginaven's testimony (I-App. 90), their distribution was confined to the sidewalk adjacent to the Wrightstown-Pemberton Road, the affidavit of Colonel Vincent Olsen (I-App. 25) stated that distribution took place on a parking lot adjacent to the road. The district court made no finding regarding where this distribution took place.

the military has a legitimate interest in prohibiting political activity on military bases (*id.* at 6a–7a). In the district court's view, this case differed from *Flower* v. *United States,* 407 U.S. 197, in which this Court reversed the conviction under 18 U.S.C. 1382 of an unauthorized pamphleteer on a public avenue crossing a military base over which the military had "abandoned any claim that it has special interests in who walks, talks, or distributes leaflets" (407 U.S. at 198), since here the military had not abandoned control over any part of Fort Dix (Pet. App. 7a).

The court of appeals reversed and directed that a preliminary injunction be entered in favor of the four plaintiff candidates, but not the four other plaintiffs who sought to distribute literature (Pet. App. 30a-31a). Relying upon *Flower, supra,* the court of appeals reasoned that "[i]f the reservation is open to all the rest of the public, there is no basis for holding that it may be closed, selectively, to political candidates or to distributors of unapproved literature" (Pet. App. 24a). This Court, dividing five-to-four, denied a stay of the court of appeals' order (409 U.S. 971; Pet. App. 33a).

The district court then entered a preliminary injunction allowing plaintiffs to campaign and to distribute campaign literature on the unrestricted areas of Fort Dix, subject only to limitations respecting time, place, and number of persons involved as "necessary to prevent interference with the military functions of the base and the flow of military and civilian traffic" (Pet. App. 34a–35a). The injunction also

barred the military from requiring prior approval of any of the candidates' communications (Pet. App. 35a). By supplementary order, the candidates or their representatives (not to exceed 25 persons at one time) were authorized to distribute campaign literature during designated times at the post exchange, family housing areas, movie theaters, and the main commissary (Pet. App. 36a–38a). In addition, the court ordered the Army to provide the candidates with a specific theater parking lot to conduct a campaign rally on the afternoon of Saturday, November 4, 1972 (Pet. App. 37a).

As these orders authorized, approximately 10,000 leaflets were distributed to military personnel at Fort Dix to announce the upcoming campaign rally (I-App. 172). Between 1:30 and 4:30 p.m. on Saturday, November 4, 1972, candidate Spock spoke to a crowd of 150 to 200 in the parking lot adjacent to a theater at Fort Dix. Approximately 60 to 75 of those attending the rally were civilians who had come to the base to hear him speak (*id.* at 172, 181). His campaign literature was also distributed there (*id.* at 172). The base authorities had assigned 60 to 65 military personnel to perform traffic control and stand-by police duty (*id.* at 181–182). Although no violent or disruptive incident occurred during the rally, 30 to 40 military personnel attended the rally in uniform and some of them held campaign placards (I-App. 174–175), in violation of AR 600–30, par. 5–29, which prohibits Army personnel from actively engaging in partisan political campaigns and permits attendance as a spec-

tator at political meetings and rallies only when the serviceman or servicewoman is not in uniform (II-App. E–63).

On June 22, 1973, the district court entered a permanent injunction in favor of candidates Spock and Hobson and the four other plaintiffs who sought to distribute literature (Pet. App. 44a–46a), all of whom are respondents here. Because plaintiff candidates Jenness and Pulley were below the constitutional age limit for the offices they had sought, however, the court dismissed the complaint in regard to them (*id.* at 40a–41a). The district court noted that the plaintiffs all desired to continue their activities at Fort Dix (*id.* at 41a). Based upon evidence of the costs of alternative methods of communicating with Fort Dix personnel (magazine and radio advertisements and direct mailing), the court found that the $10,000 jurisdictional amount requirement of 28 U.S.C. 1331(a) had been met by each plaintiff (*id.* at 41a–42a).

The district court's final order permanently enjoins the Army from interfering with political campaigning by respondents Spock, Hobson, and the Socialist Workers Party, or with the distribution of campaign literature on their behalf upon areas of Fort Dix that are open to the civilian public. The order also enjoins the Army from interfering with distribution of literature by the other respondents within the nonrestricted areas of the Fort (*id.* at 44a–45a). The order permits the Army to restrict areas of the base to military personnel, and to regulate the time, place, and number of candidates or pamphleteers "as shall be shown by defendants to be necessary to

prevent interference with the military mission of the Base and the flow of military and civilian traffic" (*id.* at 45a). The final order also enjoins the Army from enforcing its regulation barring all political speeches on base and requiring prior approval of literature distributed on the base (*ibid.*).[11]

The court of appeals affirmed the injunction (*id.* at 48a–55a).[12] The court adhered to its prior determination on the merits of the action, and sustained the district court's finding that the $10,000 jurisdictional amount requirement had been satisfied by both groups of plaintiffs (*id.* at 50a–55a).

SUMMARY OF ARGUMENT

I

Fort Dix Regulation 210–26 bars "political speeches" on the Fort Dix Military Reservation, including areas in which the public is allowed to visit. Candidates for office are therefore not permitted to engage in political campaigning on the base. This regulation does not violate the First Amendment. Candidates have no constitutional right to hold campaign rallies on a military base.

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[11] Since the final order permits any of the plaintiffs, including the Socialist Workers Party, to give a political campaign speech on the nonrestricted areas of Fort Dix, and permits anyone to distribute unauthorized literature in those areas, the case is not moot, notwithstanding that the 1972 presidential election is over.

[12] Plaintiffs Jenness and Pulley did not appeal the dismissal of the complaint as to them. Thus, that portion of the district court's order has become final.

To be sure, public roads, sidewalks, and parks "have immemorially been held in trust for use of the public and * * * have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions" (*Hague* v. *C.I.O.*, 307 U.S. 496, 515); and, in view of this tradition, First Amendment activities there are generally permitted. But a military base is not traditionally a "public forum." The primary purpose of military bases in general, and Fort Dix in particular, is to train military recruits, not to provide a campaign platform for candidates for elective office. The commander of a military base historically has had authority to exclude private persons from the base or admit them under such restrictions as he may prescribe to assure good order and military discipline. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893.

Contrary to the view of the court of appeals, this Court's *per curiam* opinion in *Flower* v. *United States*, 407 U.S. 197, rendered without briefing or oral argument, did not announce any broad, new constitutional principle that whenever the public is permitted to visit an area for some purposes the area becomes a "public forum" for purposes of the First Amendment. The Court in *Flower* held merely that a street passing through Fort Sam Houston in San Antonio, Texas, was in fact a "public street" that could not be distinguished from any other public highway where First Amendment activities traditionally cannot be barred.

The Court in *Flower* could not have meant that any military base visited by the public is thereby transformed into a public park where citizens are permitted to engage in a full range of First Amendment activities. That would force the military to make an all-or-nothing choice: either take the drastic step of severely restricting civilian access to Fort Dix, or treat the base as a Hyde Park. The choice is not required by the First Amendment. The Court has never held that any facility that the public is permitted to visit must function as a public forum. The Court's decisions make clear that it is the history and tradition of the place, rather than the mere fact of public access to it, that determines whether it is a "public forum" under the First Amendment.

The Fort Dix commanding officer had more than ample reasons for prohibiting all political campaign speeches on the base. The regulation reinforces a long line of statutes designed to guard against military involvement in the nation's political processes. If candidates were entitled to hold campaign rallies on the base, Army personnel stationed there might feel constrained to attend the speeches of those candidates perceived to be in favor of the Army and refrain from attending the speeches of those who might speak out against the Army's practices—a possibility made all the more likely on a base like Fort Dix, which is primarily concerned with the basic training of recruits. Furthermore, if political campaign speeches were permitted on base, sharp variations in attendance by military personnel might create the public impression that members of the Armed Forces were expressing their support or lack of support of particular candi-

dates—an impression that could unduly influence civilian voters. And the advent of campaign rallies on base would require that the military make delicate administrative decisions about where and when the rally is to be held and the extent to which support services should be provided—decisions likely to create lurking doubts about political favoritism, and to result in the withdrawal of facilities and personnel from military functions they otherwise would perform.

Beyond this, certain candidates might express views that could undermine morale, obedience and discipline of members of the military on the base, where it is necessary that the "law is that of obedience." *In re Grimley,* 137 U.S. 147, 153; *Parker* v. *Levy,* 417 U.S. 733, 758. Rather than discriminate among candidates on the basis of what they could be expected to say, the Fort Dix commander has wisely chosen to establish a flat ban on all campaigning on base.

What petitioners seek is not insulation of members of the armed forces from political ideas and preferences. We assert nothing more than that the role of soldier and political partisan should not be permitted to merge, that the political process should not be tainted by the introduction of a distinctively military position, and that the cohesiveness of the military should not be jeopardized by the introduction of partisan political activities. The danger of politicization of the military is minimized by regulations that draw a sharp line between politics and the armed forces and between military personnel functioning as citizens and as integral parts of the military community.

II

The final order of the district court also enjoined petitioners from enforcing Fort Dix Regulation 210–27 insofar as it requires prior submission of materials to be distributed on the base and from otherwise interfering with distribution of literature within any of the unrestricted areas of the base. Under the regulation the only publications that could not be handed out on the base would be those that posed a clear danger to the loyalty, morale or discipline of the troops.

The regulation is not a prior restraint on free speech in violation of the First Amendment. Official actions identified as unlawful prior restraints have occurred only "where public officials had forbidden the plaintiffs the use of *public places* to say what they wanted to say." *Southeastern Promotions, Ltd.* v. *Conrad,* No. 73–1004, decided March 18, 1975, slip op. 6 (emphasis supplied). But the nonrestricted areas of Fort Dix are not, as in *Southeastern Promotions,* "public forums designed for and dedicated to expressive activities" (*id.* at 9). Fort Dix is designed for and dedicated to the training of military recruits and it is therefore "a facility primarily serving a competing use" (*ibid.*).

Moreover, the regulation is reasonably calculated to provide a fair and efficient means of screening out literature that poses a "clear danger" to military loyalty, discipline, or morale. See *Procunier* v. *Martinez,* 416 U.S. 396, 413. Any disapproval of a request to distribute literature must be supported by specific

findings and is subject to prompt administrative review.

In addition, this Fort Dix regulation is not "based on content alone" and is not "justified by reference to content alone." *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 96. Rather, it is aimed at the effect of the publication on the discipline and morale of the troops on the base. If a municipal ordinance, regulating "disruptive" speech activities on a *public sidewalk,* does not violate the First Amendment because of the state's interest in the functioning of its schools, see *Grayned* v. *City of Rockford,* 408 U.S. 104, 118–119, still less is the First Amendment violated by a regulation, applicable to areas within a military base, that seeks to preserve the discipline and morale of the troops on the base.

There is no contention here that the Fort Dix commander acted arbitrarily or capriciously in denying permission to distribute certain literature. In fact, respondents never submitted material for review. Moreover, they were not precluded from using other means of communicating with military personnel, such as employing the printed or broadcast media or distributing literature to military personnel outside the Fort.

ARGUMENT

I

THE FIRST AMENDMENT DOES NOT REQUIRE THE COMMANDING OFFICER OF THE FORT DIX MILITARY RESERVATION TO PERMIT POLITICAL CAMPAIGNING ON THE BASE

The First Amendment to the Constitution provides that "the freedom of speech" shall not be abridged but as Mr. Justice Black stated for the Court, this has never meant "that people who want to propagandize protests or views have a constitutional right to do so * * * wherever they please." *Adderley* v. *Florida,* 385 U.S. 39, 48. The protections of the First Amendment, which prevent the government from restricting freedom of speech and assembly, apply only if the people have a right to be in a particular place for such purposes. Unlike public roads, sidewalks and parks, a military base is not required or intended to serve as a forum for free speech activities and certainly not for political campaigning, which is the activity involved in this aspect of the case.[13] For the

[13] Althought the regulation at issue here (n. 14, *infra*) is not limited to the giving of campaign speeches by or on behalf of candidates for office, that is the only activity involved in this case. Only those respondents who were candidates sought permission to give speeches at the base, and their complaint was based on an alleged deprivation of their First Amendment rights "to carry their ideas and election campaigns" to Fort Dix; they also emphasized their status as minor party candi-

reasons discussed below, we therefore submit that the Fort Dix regulation[14] that prohibits all campaign

dates for office (I-App. 8). The court of appeals, in deciding this issue on respondents' appeal from a denial of a preliminary injunction, stressed that these respondents were candidates for office and rested its First Amendment analysis to a great extent upon their status and their purported need to hold a campaign rally on the base (Pet. App. 28a–29a). But see n. 39, *infra*. The memorandum of the district court on respondents' motion for a permanent injunction noted that respondents Spock and Hobson "desire to continue political activity on the military reservation" (Pet. App. 41a). The final order of the district court enjoined petitioners from "interfering with political campaigning" by respondents (Pet. App. 44a), and the final opinion of the court of appeals, after the 1972 election had been held, considered the question of jurisdictional amount in terms of "the value of the right to campaign for the offices of President and Vice President" (*id.* at 51a). (Prior to the 1972 election, one of the non-candidate respondents testified that if he were allowed on the base he would hand out leaflets "and also to talk to GI's about GI rights" (I-App. 90), but he did not indicate that he desired to give political speeches and there is no indication that he did so on the base after the entry of the preliminary injunction.)

[14] Fort Dix Regulation 210–26 bars "[d]emonstrations, picketing, sit-ins, protest marches, political speeches and similar activities" on the Fort Dix Military Reservation (II-App. E–76).

In regard to "demonstrations," which are not involved in this case (see n. 13, *supra*), the Fort Dix regulation is more stringent than the Army guidelines, which suggest that permits "to conduct an on-post demonstration in an area to which the public has generally been granted access should not be denied on an arbitrary basis. Such a permit may be denied on a reasonable basis, such as a showing that the demonstration may result in a clear interference with or prevention of orderly accomplishment of the mission of the post, or present a clear danger to loyalty, discipline, and morale of the troops" (II-App. E–53).

speeches on the base, like the statute forbidding pickets or parades "in or near" courthouses upheld in *Cox* v. *Louisiana*, 379 U.S. 559, is constitutional and that the court of appeals erred in holding otherwise.

The line of decisions by this Court concerning the right of free speech in "public places" begins with *Davis* v. *Massachusetts*, 167 U.S. 43, which sustained an ordinance requiring a permit from the mayor of Boston before any person could make a public address on public grounds because, in the Court's view, the legislature could forbid speeches there altogether.[15] In *Hague* v. *C.I.O.*, 307 U.S. 496, however, the Court appeared to depart from this approach and, in his opinion (*id.* at 515–516), Mr. Justice Roberts stated in dictum a view that the Court has cited and relied upon in subsequent cases:[16]

> Wherever the title of streets and parks may rest, they have immemorially been held in trust

[15] The Court adopted the reasoning in the opinion by Mr. Justice Holmes, sitting on the Massachusetts Supreme Judicial Court, that "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in his house." *Commonwealth* v. *Davis*, 162 Mass. 510, 511. See generally Mr. Justice Frankfurter, concurring in *Niemotko* v. *Maryland*, 340 U.S. 268, 276–283; Kalven, *The Concept of Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1, 12–15.

[16] *Jamison* v. *Texas*, 318 U.S. 413, 416; *Saia* v. *New York*, 334 U.S. 558, 561, n. 2; but see *id.* at 568, n. 1 (Mr. Justice Jackson dissenting); *Kunz* v. *New York*, 340 U.S. 290, 293; *Grayned* v. *City of Rockford*, 408 U.S. 104, 115; see also *Schneider* v. *State*, 308 U.S. 147, 162; *Flower* v. *United States*, 407 U.S. 197; *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 559.

> for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Public streets, sidewalks and parks are thus recognized by the Court as areas where the public has a right to engage in free speech.[17] Historically, these are the traditional places for such activity and, although the state may impose reasonable regulations regarding time, place and manner[18] in order to preserve the primary purposes of the areas, it cannot absolutely bar the public from using such places as public forums.[19]

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[17] *Lloyd Corp.* v. *Tanner*, *supra*, 407 U.S. at 559: "it has often been held that publicly owned streets, sidewalks, and parks are so historically associated with the exercise of First Amendment rights that access to them for purposes of exercising such rights cannot be denied absolutely."

[18] See, *e.g.*, *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 98.

[19] The Court has extended the public forum concept to include state capitol grounds, *Edwards* v. *South Carolina*, 372 U.S. 229, and, for some purposes, private shopping centers, compare *Lloyd Corp.* v. *Tanner*, *supra*, with *Amalgamated*

There are other publicly owned areas, however, that have not traditionally been used for the exercise of First Amendment rights and where the public has no right of access for such purposes.[20] Military bases in general, and Fort Dix in particular, are such places.

Until the preliminary injunction was issued in this case, no one had ever given or been permitted to give a political campaign speech on the Fort Dix Military Reservation (I–App. 63). It is the "primary business of armies and navies to fight or to be ready to fight wars should the occasion arise," *Toth* v. *Quarles*, 350 U.S. 11, 17, and the purpose of the base is to train

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Food Employees Union v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, and municipal theatres, *Southeastern Promotions, Ltd.* v. *Conrad*, No. 73–1004, decided March 18, 1975, slip op. at 9–10, *id.* at 1 (Mr. Justice Douglas, dissenting).

[20] See *Adderley* v. *Florida*, *supra* (demonstration on the grounds of a jail); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (advertising space on vehicles of a city transit system). See also Mr. Justice Brennan, dissenting in *Lehman*, *supra*, 418 U.S. at 312 ("To be sure, there are some public places which are so clearly committed to other purposes that their use as public forums for communication is anomalous."); and Mr. Justice Douglas, dissenting in *Adderley*, *supra*, 385 U.S. at 54:

"There may be some public places which are so clearly committed to other purposes that their use for the airing of grievances is anomalous. There may be some instances in which assemblies and petitions for redress of grievances are not consistent with other necessary purposes of public property. A noisy meeting may be out of keeping with the serenity of the statehouse or the quiet of the courthouse. No one, for example, would suggest that the Senate gallery is the proper place for a vociferous protest rally. And in other cases it may be necessary to adjust the right to petition for redress of grievances to the other interests inhering in the uses to which the public property is normally put."

military recruits, not to provide a public forum for candidates for office. As far as tradition is concerned, the commander of a military base historically has had authority " 'in his discretion, [to] exclude private persons and property therefrom, or admit them under such restrictions as he may prescribe in the interest of good order and military discipline (1918 Dig. Op. J.A.G. 267 and cases cited).' JAGA 1925/680.44, 6 October 1925." *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 893. Indeed, as this Court has recognized, management of "the internal operation of an important federal military establishment" is something over which "the Federal Government * * * has traditionally exercised unfettered control" (*id.* at 896).[21]

Thus, in Mr. Justice Roberts' words, the Fort Dix Military Reservation is not "held in trust for the use of the public" and political campaigning on this base has not "from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague* v. *C.I.O., supra,* 307 U.S. at 515.

However, the court of appeals, relying on *Flower* v. *United States,* 407 U.S. 197, apparently decided that since there are areas of Fort Dix open to the public, these areas must be considered "public forums" under the First Amendment; therefore, the court concluded, the Fort Dix regulation barring all political campaign

[21] See also *Holdridge* v. *United States*, 282 F.2d 302 (C.A. 8); *Weissman* v. *United States*, 387 F.2d 271 (C.A. 10); *United States* v. *Jelinski*, 411 F.2d 476 (C.A. 5), certiorari denied, 396 U.S. 943; *Bridges* v. *Davis*, 443 F.2d 970 (C.A. 9), certiorari denied, 405 U.S. 919; 3 Op. Atty. Gen. 268 (1837); 26 Op. Atty. Gen. 91 (1906).

speeches on the base was unconstitutional because it denied access to places where candidates had a right to be for such purposes (Pet. App. 21a–24a, 26a–29a).

The holding of the court of appeals in this regard is, we submit, erroneous. That the public may visit publicly owned property does not mean that the property is therefore a "public forum," [22] and this Court

[22] Mr. Justice Blackmun's opinion in *Lehman* v. *City of Shaker Heights*, *supra*, 418 U.S. at 302 (joined by three other Members of the Court) and Mr. Justice Frankfurter's concurring opinion in *Niemotko* v. *Maryland*, *supra*, 340 U.S. at 283, n. 1, quoted from Lord Dunedin's remarks in *M'Ara* v. *Edinburgh Magistrates and Others*, 50 Sc. L. Rep. 829, 837, which are pertinent here:

"Now the right of free speech undoubtedly exists, and the right of free speech is to promulgate your opinions by speech so long as you do not utter what is treasonable or libellous, or make yourself obnoxious to the statutes that deal with blasphemy and obscenity. But the right of free speech is a perfectly separate thing from the question of the place where that right is to be exercised. You may say what you like provided it is not obnoxious in the ways I have indicated, but that does not mean that you may say it anywhere.

"I am not going to deal with what may be the case in open spaces or public places. It seems to me that no general pronouncement upon that subject could be made, because although for convenience sake one often speaks of open spaces or of public places, the truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular place. For example, there may be certain places which are dedicated to certain uses, * * * and things that otherwise were lawful might be restrained if they interfered with the purposes of that dedication. Each of those cases must be dealt with when it arises. Here we are dealing with a street proper, because this place at the Mound is just one of the streets of the city. It is a thoroughfare, although probably not a very much used thoroughfare at that particular corner. In such a place there

has never held otherwise. First Amendment activities cannot be absolutely barred from public streets, sidewalks and parks but this is because these are the traditional places for such activities;[23] obviously that tradition could not have arisen and become part of "the freedom of speech" if the public had always been barred from such places; but it is the history and tradition of the place, not the fact of public access to it, that determines whether it is a "public forum" for First Amendment purposes.[24]

No one, for example, would suppose that political candidates have a constitutional right to give campaign speeches on the grounds of or inside the areas of the Supreme Court building generally open to the public; and under 40 U.S.C. 13k, it is "unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any *party*, organization, or movement" (emphasis added). Indeed, although the public had free access to the area "near" the courthouse in *Cox* v. *Louisiana, supra,* 379

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is not the slightest right in anyone to hold a meeting as such."

[23] See pp. 27–28, *supra.*

[24] See, *e.g., Lloyd Corp.* v. *Tanner, supra; Lehman* v. *City of Shaker Heights, supra,* 418 U.S. at 303 (opinion of Mr. Justice Blackmun); *id.* at 306 (Mr. Justice Douglas, concurring: "But a streetcar or bus is plainly not a park or sidewalk or other meeting place for discussion, any more than is a highway. It is only a way to get to work or back home. The fact that it is owned and operated by the city does not without more make it a forum.")

U.S. at 562, the Court nevertheless held that no one had a First Amendment right to picket there.[25]

Thus, *Flower* v. *United States, supra,* cannot be read as establishing any new First Amendment principles: it does not mean, as the court below thought it did, that if a publicly owned area is open to the public for any purpose, the area becomes a public forum for purposes of the First Amendment.[26] In a *per curiam* opinion not preceded by briefing or oral argument, the Court in *Flower* held merely that a street passing through Fort Sam Houston in San Antonio, Texas, was in fact a "public street" that could not be distinguished from any other public highway; therefore, the military authorities could not prevent a civilian from handing out leaflets along the street to the many civilians and military personnel that passed by each day. 407 U.S. at 198. In short, the street in *Flower* was a public street, and the decisions of this Court regarding streets, sidewalks and parks applied.[27]

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[25] See also Kalven, note 15 *supra,* at 30.

[26] Other courts have similarly read *Flower* to establish the proposition that an area open to the public thereby becomes a public forum for First Amendment activities. See *United States* v. *Gourley,* 502 F.2d 785, 787–788 (C.A. 10) (pamphleteering and demonstrating); *Burnett* v. *Tolson,* 474 F.2d 877, 880–881 (C.A. 4) (leafletting); *CCCO-Western Region* v. *Fellows,* 359 F. Supp. 644, 649–650 (N.D. Cal.) (leafletting); *Jenness* v. *Forbes,* 351 F. Supp. 88, 94–95 (D. R.I.)

[27] In *Flower* the Court accordingly quoted *Jamison* v. *Texas, supra,* 318 U.S. at 416 ("one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion"). 407 U.S. at 198–199.

In order to apply *Flower* to this case, the Court would have to find that Fort Dix is, in effect, a public park where the only restrictions on freedom of expression can be regulations governing time, place and manner. Such a finding would not only be contrary to the record,[28] but also would require the military to make an all-or-nothing choice: either take the drastic step of severely restricting civilian access to Fort Dix, placing numerous guards and strict warnings throughout the area, or transform the base into a Hyde

[28] Unlike New Braunfels Avenue within Fort Sam Houston where the military had "abandoned any claim that it has special interests in who walks, talks, or distributes leaflets * * *," *Flower* v. *United States*, *supra*, 407 U.S. at 198, the areas of Fort Dix open to the public nevertheless are dedicated primarily to military purposes. The provost marshal of the base patrols all roads on a 24-hour basis, signs are conspicuously posted warning that civilian vehicles are subject to search, the military police occasionally impose roadblocks to check all vehicles, "No Trespassing" signs are conspicuously posted over part of the area, and the military authorities actively enforce regulations providing for eviction of civilians engaged in unlawful activities (I–App. 25, 78, 79). Peddlers, solicitors, and concessionaries must be authorized by the Fort Commander to conduct business on the base, and customers must display identification cards (*id.* at 61–62, 80). The Army has not, therefore, "abandoned any claim" that it has a special interest in what occurs on nonrestricted areas of the base. Moreover, while in *Flower* the distribution of leaflets may have been directed primarily at civilians passing on the public sidewalk, respondent candidates in the instant case avowedly sought to "visit Fort Dix to campaign among the servicemen and servicewomen there" (*id.* at 12). Their activities were not confined to an avenue or sidewalk. Candidate Spock spoke to a crowd of 150 to 200 persons on a parking lot adjacent to a theater within the military compound (*id.* at 172, 181).

Park.[29] The First Amendment does not demand that such a choice be made. The Fort Dix commanding officer had more than an adequate basis for deciding to prohibit all political campaign speeches on the base [30] and this was a decision he had authority to make.[31]

Traditionally, the military has attempted to remain politically neutral, particularly with respect to candidates for elective office. Nearly a century ago, General William T. Sherman, Commanding General of the Army from 1869 to 1883, stated that it was vitally important to "keep the Army and Navy as free from politics as possible, for emergencies that may arise at

[29] See *Lehman* v. *City of Shaker Heights*, *supra*, 418 U.S. at 304 (opinion of Blackmun, J.), refusing to transform public transit cars into First Amendment forums because if the Court held otherwise "display cases in * * * military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician."

[30] In assessing the validity of restrictions on "free speech" activities in regard to areas other than traditional public forums, the Court has examined the reasons for the regulations in light of the purposes served by the public facility or area. See *Pell* v. *Procunier*, 417 U.S. 817, 823–828; *Lehman* v. *City of Shaker Heights*, *supra*, 418 U.S. at 302–303 (opinion of Blackmun, J.); *Adderley* v. *Florida*, *supra*, 385 U.S. at 47–48 ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."); *Cox* v. *Louisiana*, *supra*, 379 U.S. at 562 ("There can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create."); *id.* at 583 (Mr. Justice Black, concurring in this portion of the Court's opinion). See also *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 119.

[31] See *Cafeteria Workers* v. *McElroy*, *supra*, 367 U.S. at 893, 896. See p. 30, *infra*.

any time" (Thorndike, *The Sherman Letters* 342 (1894)).[32]

Recognizing that military influence in elections and military support of candidates for office could threaten democratic processes, Congress has enacted a long line of statutes designed to guard against military involvement in the nation's political processes. Members of the armed forces may not be polled by any person or political party to determine their choice among candidates for elective office. 18 U.S.C. 596. It is unlawful to solicit political contributions in any fort or arsenal, 18 U.S.C. 603; candidates for federal office are prohibited from soliciting contributions from military personnel, 18 U.S.C. 602.[33] And no commissioned or noncommissioned officer in the Armed Forces may attempt to influence any member of the Armed Forces to vote for any particular candidate. 50 U.S.C. 1475.[34]

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[32] See also Carter, *The Evolution of Army Reforms*, 3 United Service 1190 (May, 1903); Hayes, *The Writings of Stephen B. Luce*, 29 Military Affairs 78 (Winter, 1955).

[33] 18 U.S.C. 602 applies to any officer or employee of the United States or any department or agency thereof. See also 18 U.S.C. 607.

[34] Moreover, no officer of the Armed Forces may "in any manner interfere with the freedom of any election in any State." 42 U.S.C. 1972. See also 18 U.S.C. 593. It is unlawful for a military officer to have troops under his control at any place where a general election is held. 18 U.S.C. 592.

AR 600–20, par. 5–29 prohibits any member of the Army from becoming a candidate for or holding civil office (pars. 5–30 and 5–31). Servicemen are prohibited from actively participating in partisan political campaigns on or off base, such as making partisan public speeches in the course of a campaign (AR 600–20, Appendix A, par. A–2, II–App. E–63 to E–64, E–65). AR 670–5, par. 1–2(*f*)(5) prohibits servicemen from wearing their uniforms when participating in activities, "such as public speeches, interviews, picket lines, marches, rallies, or any public demonstration (including those pertaining to civil rights), which may imply service sanction of the cause for which the demonstration or activity is being conducted" (II–App. E–73 to E–74).

The regulation prohibiting political campaign speeches on Fort Dix reinforces this legislation and the tradition of political neutrality of the military reflected in it. If candidates were permitted to hold campaign rallies on the base, as respondents did, there would be a real danger that units of the nation's armed forces would become politicized. Members of the Army stationed there might feel constrained to attend the speeches of those candidates perceived to be in favor of the Army and refrain from attending the speeches of those who might speak out against the Army's practices. There is no way to avoid the possibility of apprehension in the minds of servicemen and servicewomen that their attendance or failure to attend a particular campaign rally on the base might be viewed with disfavor by their superiors; and the possibility of such apprehension is all the more likely on a base like Fort Dix, which is primarily concerned with the basic training of recruits. Yet as the statutes set forth above indicate, Congress has legislated to prevent military officers from influencing the votes of those in their command. The First Amendment, we submit, did not forbid the commanding officer of

Fort Dix from guarding against the same evil by forbidding campaign speeches on the base altogether.[35]

Moreover, if political speeches were allowed on the base, the rallies of some candidates might be poorly attended while other candidates might draw large audiences. This could create the public impression that members of the Armed Forces were expressing their support or lack of support of particular political candidates and parties, an impression that could unduly influence civilian voters in their choice.[36] In view of this danger, it is hardly surprising that Congress has made it a criminal offense to poll servicemen about their preferences in an election. 18 U.S.C. 596.

Beyond this, it is important to remember that we are concerned here with a military facility devoted to a particular military mission. The advent of campaign rallies on military bases not only will require that the military make delicate administrative decisions about where and when the rally is to be held and the extent to which support services should be provided—decisions which may create lurking doubts about political favoritism, cf. *Lehman* v. *City of Shaker Heights, supra,* 418 U.S. at 304—but also may result in military facilities and support personnel used in the rally being withdrawn from military

[35] In this regard, see the Court's recent decision in *Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548, upholding the constitutionality of Section 9(a) of the Hatch Act, 5 U.S.C. 7324(a)(2).

[36] The holding of a political campaign rally on a military base may also create the impression that the military authorities there favor the candidate if no or only a few other candidates choose to appear at the base.

functions they otherwise would perform. Accommodation of a number of such campaign rallies could therefore hamper the efficiency of military training.

It is similarly important to recognize that unlike the situation in the civilian community, the commanding officer of a military base has a direct and legitimate interest in preserving the discipline and morale of his troops. See *Parker* v. *Levy,* 417 U.S. 733, 759. We do not in any way deprecate the value of freedom of speech by observing that certain candidates might express views that could undermine the morale, obedience and discipline of members of the military at the base.[37] In a civilian context, speech could not and should not be regulated for such a reason, but First Amendment principles cannot be so readily transferred to a military setting where the "law is that of obedience." *In re Grimley,* 137 U.S. 147, 153; see *Parker* v. *Levy, supra,* 417 U.S. at 758. Of course, one way of preventing any impairment of morale and discipline would be to discriminate among candidates on the basis of what they could be expected to say. The Fort Dix authorities have wisely chosen not to do so[38] and have instead attempted to keep the

[37] 18 U.S.C. 2387 makes it a criminal offense to urge or counsel insubordination or refusal of duty by any member of the military, with intent to impair the "loyalty, morale, or discipline of the military or naval forces of the United States."

[38] There is no suggestion that Fort Dix Regulation 210-26 has ever been administered in a discriminatory manner. Prior to Dr. Spock's appearance at Fort Dix, no political candidate had ever appeared there. Compare *Jenness* v. *Forbes,* 351 F. Supp. 88 (D. R.I.); *Butler* v. *United States,* 365 F. Supp. 1035 (D. Haw.).

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base free from political entanglement by refusing to allow it to be used as a campaign platform."[39]

Members of the military are, of course, continually exposed to the clash of political ideas. Advocacy and debate reach them on military bases through television, radio, magazines, newspapers, and discussions with other military persons. While off-base, members of the armed forces, if out of uniform, may freely attend political rallies. Thus, what petitioners seek here is not insulation of members of the armed forces from political ideas and preferences. It is vital that mem-

[39] The court of appeals stated that in regard to Fort Dix there was a "feigned neutrality" that "serves no discernible military purpose" (Pet. App. 29a). The court did not suggest that the Fort Dix military authorities had been supporting certain candidates. Rather, the court's statement was directed to the fact that servicemen on the base had numerous means, such as radio, television and the press, for receiving information about candidates; in view of this, the court apparently believed that "minor candidates" who did not attract media coverage were disadvantaged in reaching military personnel on the base (*ibid.*). There are a number of answers to this line of reasoning.

First, as discussed above, the military's neutrality does serve a purpose and an important one. Second "minor" candidates are usually financially disadvantaged, but the First Amendment does not give them any greater rights than more prominent candidates. Third, the fact that some candidates cannot afford television advertisements or newspaper announcements does not confer upon them a right to campaign wherever they please: there is no reason why, if they desire to conduct a face-to-face campaign, they cannot hold campaign rallies outside the base for servicemen who can attend on their free time so long as they are not in uniform. Fourth, the availability of this alternative means of communication, as well as the others mentioned above, militates strongly in favor of the validity of the on-base campaigning bar, as the Court held in an analogous situation in *Pell* v. *Procunier*, *supra*, 417 U.S. at 823–828.

bers of the armed forces of a democracy also play the roles of citizens of the wider political community. All that petitioners seek is that the role of soldier and that of political partisan never be permitted to merge, that the armed forces be protected from politicization in the interests both of our political process and of the effectiveness of our military forces.

Politicization of the military could take either of two forms, each highly undesirable. Unrestricted campaigning upon military bases could, in some atmospheres, produce a distinctively military position in civilian politics, a result that should be viewed as little short of catastrophic, a result that would be a breach of the philosophy underlying the American idea of a politically neutral military establishment under civilian control. In other circumstances, in times of bitterly divisive national politics, politicization of the military could result in sharp political divisions within the armed forces, a condition that might prove disastrous to the cohesiveness of military units and their ability to carry out their assigned missions.

The dangers of politicization are minimized by regulations that make military bases enclaves in which explicitly partisan political rallies may not be held. This regulation tells the public as well as the armed forces that there is a distinct line between American politics and American armed forces, that when members of the armed forces engage in political campaigns they do so as individuals, out of uniform and off base, not on base as integral parts of a military community.

In view of the foregoing, the Fort Dix regulation is, we submit, valid under the First Amendment. The authority of a commanding officer over his post is necessarily broad [40] and his judgment on matters such as those at issue here, which involve the functioning of the base and the troops under his command, are entitled to much weight. See *Cafeteria Workers* v. *McElroy, supra,* 367 U.S. at 890–893. As this Court stated in *Orloff* v. *Willoughby,* 345 U.S. 83, 94, the "military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." See *Schlesinger* v. *Ballard,* 419 U.S. 498, 510.

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[40] See *Committee to Free the Fort Dix 38* v. *Collins,* 429 F. 2d 807, 809 (C.A. 3) (civilians were refused permission to demonstrate on the base against Fort Dix stockade conditions; the court held that the case was moot). As the court of appeals there pointed out, Article I, Sec. 8, of the Constitution gives Congress power to raise armies, to make rules to govern the land and naval forces, and to exercise exclusive legislation over forts. Article II, Sec. 2, provides that the President shall be the Commander in Chief of the Army and Navy. See *Schlesinger* v. *Ballard,* 419 U.S. 498, 510. Under 10 U.S.C. 3061, the President "may prescribe regulations for the government of the Army"; and 32 C.F.R. 552.18(d) provides:

"The installation commander will establish appropriate rules governing the entry of persons upon and exit from, the installation * * *."

II

THE FIRST AMENDMENT DID NOT FORBID THE COMMANDING OFFICER OF THE FORT DIX MILITARY RESERVATION FROM REQUIRING PERMISSION FOR THE DISTRIBUTION OF LEAFLETS ON THE BASE, WHICH PERMISSION WOULD BE DENIED ONLY IN REGARD TO PUBLICATIONS THAT CLEARLY THREATEN MILITARY DISCIPLINE OR MORALE

Fort Dix Regulation 210–27 prohibits the "distribution or posting of any publication * * * [on base] without prior written approval of the Adjutant General * * *" (II-App E–78).[41] Exceptions are made only for official military publications. Distributions through official outlets, such as post-exchange newsstands, are governed by separate regulations.[42] A commander must

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[41] Military regulations requiring prior approval for on-base distributions of literature by *servicemen* have been uniformly sustained. See, *e.g., Dash* v. *Commanding General,* 307 F. Supp. 849 (D. S.C.), affirmed, 429 F. 2d 427 (C.A. 4), certiorari denied, 401 U.S. 981; *Yahr* v. *Resor,* 431 F. 2d 690 (C.A. 4), certiorari denied, 401 U.S. 982; *Noland* v. *Irby,* 341 F. Supp. 818 (W.D. Ky), affirmed *sub nom. Noland* v. *Desobry,* C.A. 6, No. 71–1661 April 24, 1972, certiorari denied, 409 U.S. 934; *Schneider* v. *Laird,* 453 F. 2d 345 (C.A. 10), certiorari denied, 407 U.S. 914; *Carlson* v. *Schlesinger,* 511 F. 2d 1327 (C.A.D.C.).

[42] While no prior approval is required for the distribution [redacted] of materials through official outlets, such as the post exchange, a post commander may delay distribution of a specific periodical only if he finds that it constitutes a clear danger to military loyalty, discipline, or morale. If the Department of the Army agrees, distribution can be prohibited (see AR 210–10, II-App. E–58). Of course, established publications—unlike most pamphlets distributed by civilians— have past issues which normally provide a clear indication whether their next issue is likely to present a "clear danger" to the military.

approve distribution unless he finds that the "publication constitutes a clear danger to military loyalty, discipline, or morale" (AR 210–10, par. 5–5*b*, II-App. E–58). The Army Directive on Guidance on Dissent states that a "commander may not prevent distribution of a publication simply because he does not like its contents" or because it "is critical—even unfairly critical—of government policies or officials * * *" (II-App. E–51). As examples of publications that can be barred, the Directive lists publications which are obscene or that counsel disloyalty, mutiny, or refusal of duty (*ibid.*). AR 210–10 provides for prompt review by the Department of the Army of any decision denying approval (*id.* at E–58).

The final order of the district court, enjoining petitioners from enforcing Fort Dix Regulation 210–27 insofar as it requires prior submission and approval of materials to be distributed on the base and from otherwise interfering with distribution of literature within any of the unrestricted areas of Fort Dix (Pet. App. 44a–45a), vitiates the base commander's authority to prevent clearly dangerous publications from being distributed to military personnel under his command,[43] unless he were to take the drastic step of

[43] The new regulation governing the distribution of literature at Fort Dix, promulgated in light of the final order of the district court, does not require that the literature sought to be distributed be submitted for approval prior to distribution. Permission will ordinarily be granted to distribute in nonrestricted areas normally accessible to the public "provided that the manner of distribution does not interfere with normal traffic flow and is conducted at such times and places as will not hinder the accomplishment of any military mission." Fort Dix Regulation 210–27 (December 16, 1974).

closing the entire base to civilians. But "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline" in the military, *Parker* v. *Levy, supra,* 417 U.S. at 758, is crucial to the military mission and "the military must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman,* No. 73–662, decided March 25, 1975, slip op.

As the Court of Military Appeals has explained (*United States* v. *Priest,* 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338):

> Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. *Brandenburg* v. *Ohio, supra* [395 U.S. 444]. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected. *United States* v. *Gray, supra* [20 U.S.C.M.A. 63].

See also *Dash* v. *Commanding General,* 307 F. Supp. 849 (D. S.C.), affirmed, 429 F. 2d 427 (C.A. 4), certiorari denied, 401 U.S. 981; *Schneider* v. *Laird,* 453 F. 2d 345 (C.A. 10), certiorari denied, 407 U.S. 914.

Fort Dix Regulation 210–27 is not an unconstitutional prior restraint upon free speech. The government function at stake is not the police power to control civilian activities on public streets, parks, and walkways, where prior restraints on First Amendment rights must bear a heavy presumption against their constitutional validity. See, *e.g., Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419. As we indicated in part I, *supra,* Fort Dix is not a "public forum" and the nonrestricted areas of the base are not like public parks or public streets where the First Amendment traditionally protects communicative activities. Notwithstanding that civilians may visit there, the property is dedicated primarily to military purposes See pp. 29–35, *supra.*

Official actions identified as unconstitutional prior restraints have occurred "where public officials had forbidden the plaintiffs the use of *public places* to say what they wanted to say." *Southeastern Promotions, Ltd.* v. *Conrad,* No. 73–1004, decided March 18, 1975, slip op. at 6 (emphasis supplied). But when, as here, the place is not a public forum to begin with, the power to deny its use in advance of actual expression is not constitutionally suspect. As the Court stressed in *Southeastern Promotions,* the prior restraints there related to "public forums designed for and dedicated to expressive activities," (*id.* at 9), and the "[p]etitioner was not seeking to use a facility primarily serving a competing use," (*ibid.*). Fort Dix, in contrast, is not now, and has never been, a traditional public forum, and it primarily serves a competing use—the training of military recruits.

Moreover, in *Procunier* v. *Martinez,* 416 U.S. 396, which involved the constitutionality of prison regulations authorizing censorship of inmate correspondence, the Court enumerated the following standard for determining the constitutionality of such regulations (416 U.S. at 413):

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. * * * Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.

These criteria are satisfied by Fort Dix Regulation 210–27, which furthers the substantial governmental interest of assuring that civilians who enter the military facility intending to distribute literature will not jeopardize military loyalty, discipline, or morale. Moreover, the regulation is reasonably calculated to provide a fair and efficient means of screening out such publications. The discretion of the base commander is confined within reasonably precise standards. *Parker* v. *Levy, supra,* 417 U.S. at 752–757. The base commander may deny permission only if he determines that the specific publication presents a clear danger to the loyalty, discipline, or morale of his troops. He is required to make specific findings in support of any restriction imposed by him under the regulation. He may not prevent distribution of a publication simply because he does not like its contents or because the publication is critical—even unfairly criti-

cal—of government policies or officials. And any decision to deny permission is subject to prompt administrative review (II–App. E–58).

This regulation is not "based on content alone" and is not "justified by reference to content alone." *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 96. Rather, it is aimed at the effect of the publication on the discipline and morale of the troops on the base. In *Grayned* v. *City of Rockford, supra,* 408 U.S. at 118–119, the Court sustained an ordinance prohibiting picketing on a *public sidewalk* outside a school building because the regulation punished only "expressive activity" that "disrupts or is about to disrupt normal school activities."[44] If such a municipal ordinance, regulating speech on a *public sidewalk,*[45] does not violate the freedom of speech because of the state's interest in the functioning of its schools, still less is the First Amendment violated by a regulation, applicable to areas within a military base, that seeks to preserve the discipline and morale of the troops on the base.

As we emphasized in part I, supra, pp. 35–42, the military is a specialized community, the relationship of a commander to his troops has no counterpart in the civilian community, and the commander has the authority, indeed the duty, to ensure the discipline and morale of the servicemen under his command. The

[44] The Court recognized that the ordinance prohibited "some picketing that is neither violent nor physically obstructive." 408 U.S. at 120.

[45] Cf. *Flower* v. *United States, supra.*

Founders knew this full well and could hardly have intended the First Amendment to abrogate this long-standing practice and tradition. The interest of a municipality in the orderly functioning of its schools is important, to be sure; but in light of the unique relationship of a base commander to his troops and the fact that the regulation at issue here deals solely with activities inside a military base, it is plainer still that "[s]uch a reasonable regulation is not inconsistent with the First" Amendment. *Grayned* v. *City of Rockford, supra,* 408 U.S. at 121.[46]

"It is possible, of course, that there will be unconstitutional applications; but that is not a matter which presently concerns us." *Grayned* v. *City of Rockford, supra,* 408 U.S. at 121 n. 50, citing *Shuttlesworth* v. *Birmingham,* 382 U.S. 87, 91. There is not, and cannot be, a contention here that the commander of Fort Dix acted arbitrarily or capriciously in denying permission to distribute certain literature.[47] In fact, respondents never submitted any material for

[46] As in *Grayned*, the regulation here is not an "impermissibly broad prophylactic ordinance" since it would prohibit only the distribution of leaflets that present a clear danger to loyalty, discipline or morale. 408 U.S. at 119.

[47] During the hearing on the preliminary injunction, Colonel Vincent Olsen, provost marshal at Fort Dix, was asked to explain the procedure for distributing literature through the post exchange. He testified, incorrectly, that literature would not be allowed to be distributed "if it's wrong" (I–App. 77). As Colonel Olsen stated and the court noted, it was not Colonel Olsen's job to review literature for distribution (*id.* at 76, 77), and his testimony therefore cannot be taken to represent Fort Dix policy.

review. They were barred from coming onto Fort Dix because they had previously attempted to distribute literature without obtaining prior approval for the distribution.

Respondents were not precluded from using other means of communicating with military personnel. They were free to employ the printed or broadcast media. They could also distribute literature to military personnel outside Fort Dix. Indeed, the Philadelphia Resistance, with which respondent Hardy is affiliated, maintained a store front near the base, in Wrightstown (I-App. 178). See n. 39, *supra*. What they could not do—and what the final order of the district court now permits—is to distribute on nonrestricted areas of Fort Dix literature posing a clear danger to military loyalty, discipline, or morale.[48]

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[48] The injunction is further improper in that it rescinds the bar order against one pamphleteer whose conduct was not protected by the First Amendment even under the rationale of the court of appeals. Plaintiff Stanton was barred from Fort Dix because he had distributed leaflets in a barracks (I–App. 9), a restricted area not open to the civilian public (*id.* at 73, 199).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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